Supreme Court, U.S.
FILED

01 568 AUG 22 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

MICHAEL FITZWATER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LOUISE H. RENNE,
State Bar #36508
City Attorney
JOANNE HOEPER,
State Bar #114961
Chief Trial Attorney
BRIAN GEARINGER,
State Bar #146125
Counsel of Record
ELLEN FORMAN,
State Bar #147479
Deputy City Attorneys
Fox Plaza
1390 Market Street, 6th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3914
Facsimile: (415) 554-3837

Attorneys for Petitioner
City and County of San Francisco

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED

Whether federalism and comity require a federal circuit court to defer to a state appellate court's ruling that a sheriff is a state actor when operating a jail as required by state law.

LIST OF PARTIES

The parties are Petitioner the City and County of San Francisco, a municipal corporation, and Respondent Michael Fitzwater.

RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of the stock in any party to this petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. THE RECENT DECISIONS OF THE NINTH CIRCUIT CONFLICT WITH CALIFORNIA CASE LAW HOLDING THAT A SHERIFF IS A STATE, NOT A COUNTY, POLICYMAKER WHEN PERFORMING LAW ENFORCEMENT ACTIVITIES 4

II. CERTIORARI IS NEEDED TO ASSURE THAT FEDERAL COURTS FOLLOW THIS COURT'S REQUIREMENT OF DEFERENCE TO STATE COURTS ON INTERPRETATION OF STATE LAW 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bush v. Gore, 531 U.S. 98 (2000) 5

Comm'r of Internal Revenue v. Estate of Bosch, 387 U.S. 456 (1967) 5

County of Los Angeles v. Superior Court (Peters), 68 Cal.App.4th 1166 (1998), *rev. den'd* (March 17, 1999) 3, 5, 6

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) 7

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) 7

McMillian v. Monroe County, 520 U.S. 781 (1997) 4, 6

Pitts v. County of Kern, 17 Cal.4th 340 (1998) 5

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001), *petition for cert. filed* (U.S. Jun. 12, 2001) (No. 00-1863) 3, 4, 5, 6, 7

CONSTITUTIONS

California Constitution, Article V, § 13 1

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292 7

42 U.S.C. § 1983 ..... 1, 2, 3

California Civil Code § 22.2 1

California Government Code § 200 2

California Government Code § 201 2

TABLE OF AUTHORITIES – Continued

Page

California Government Code § 202..... 2
California Government Code § 203..... 2
California Government Code § 12524..... 2
California Government Code § 12550..... 2
California Government Code § 12560..... 2
California Government Code § 23013..... 2
California Government Code § 25303..... 2
California Government Code § 26605..... 2
California Penal Code § 4000 2
California Penal Code § 4015 2

PETITION FOR A WRIT OF CERTIORARI

The City and County of San Francisco petitions for a writ of certiorari to review the judgment of the Ninth Circuit United States Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit United States Court of Appeals is not officially reported but is printed in the Appendix hereto at App. 1-2. The order and judgment of the United States District of the Northern District of California is also not officially reported but is printed in the Appendix hereto at App. 3-5.

JURISDICTION

The Ninth Circuit filed its order on May 24, 2001. App. 6. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are relevant to this petition and are set forth in the Appendix at App. 7-13:

42 U.S.C. § 1983

California Constitution, Article V, § 13

California Civil Code § 22.2

California Government Code § 200

California Government Code § 201

California Government Code § 202

California Government Code § 203

California Government Code § 12524

California Government Code § 12550

California Government Code § 12560

California Government Code § 23013

California Government Code § 25303

California Government Code § 26605

California Penal Code § 4000

California Penal Code § 4015(a)

STATEMENT OF THE CASE

Michael Fitzwater alleged that he was beaten while he was an inmate in the San Francisco County Jail. On March 23, 1995, he sued the City and County of San Francisco, through the Sheriff of the City and County of San Francisco acting in his official capacity, in the California Superior Court for civil rights violations under 42 U.S.C. § 1983.

San Francisco removed the case to the United States District Court for the Northern District of California. That Court dismissed Fitzwater's civil rights complaint because "[t]he County is immune for suit for actions

taken by sheriffs who work as jailers at the County jails. Sheriffs in California are state actors who do not qualify as 'persons' within the meaning of 42 U.S.C. § 1983." App. 3.

On May 24, 2001, in an unpublished memorandum decision, the Ninth Circuit United States Court of Appeal reversed stating that "[w]e recently decided . . . that when a sheriff in California performs the function of 'oversight and management of the local jail,' the sheriff acts for the county, not the state. As a result, the City and County of San Francisco are not entitled to Eleventh Amendment immunity on Fitzwater's § 1983 claim." App. 2. The Court relied exclusively on its decision in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001), *petition for cert. filed* (U.S. Jun. 12, 2001) (No. 00-1863). In *Streit*, the Ninth Circuit held that sheriffs are county, rather than state, policymakers when making decisions about the release of prisoners. *Id.* at 561. In so holding, the *Streit* court rejected a California appellate court decision that under the same facts came to the opposite conclusion. *See County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166 (1998), *rev. den'd* (March 17, 1999).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit decisions in *Streit* and this case raise a compelling issue of federalism; namely, whether a federal court must follow a state appellate court's ruling on a state law question of a state official's function.

In *McMillian v. Monroe County*, 520 U.S. 781 (1997), this Court recognized that civil rights liability for sheriffs depends on whether the sheriff represents the state or the county when exercising the particular function at issue. 520 U.S. at 785-786. This Court stated that the answer to this question "will necessarily be dependent on the definition of the official's functions *under relevant state law.*" *Id.* at 786, emphasis added.

Nevertheless, the Ninth Circuit refused to follow a state appellate court's decision – based on state law – that sheriffs are state rather than county officials when performing law enforcement functions. The Ninth Circuit's disregard of state court precedent implicates all areas in which federal courts have to interpret state law. Accordingly, the Ninth Circuit decisions in *Streit* and this case provide much needed opportunities for the Court to define how a federal court decides state law.

I. THE RECENT DECISIONS OF THE NINTH CIRCUIT CONFLICT WITH CALIFORNIA CASE LAW HOLDING THAT A SHERIFF IS A STATE, NOT A COUNTY, POLICYMAKER WHEN PERFORMING LAW ENFORCEMENT ACTIVITIES

This Court oft repeats one of the basic principles of federalism, that federal courts must defer to state courts' interpretations of state law: "In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as

sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). In addition, this Court held that " 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967), citation omitted, emphasis in original.

Here, the Ninth Circuit breached this fundamental principle by contradicting a state appeal court's decision on an issue of state law. In *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th at 1178, the California Court of Appeal analyzed California constitutional and statutory authority and concluded that "in setting policies concerning release of persons from the Los Angeles County Jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles." The *Peters* court closely tracked the then recent decision of the California Supreme Court in reaching this conclusion. In *Pitts v. County of Kern*, 17 Cal.4th 340 (1998), the California Supreme Court examined the identical provision of the California Constitution and the virtually identical California statutes governing a district attorney vis-à-vis a sheriff, and held that a county district attorney acts for the state, rather than the county, when prosecuting crimes and establishing policies and training.

In *Streit*, the Ninth Circuit acknowledged the holding in *Peters* but refused to follow it. Indeed, the Ninth Circuit stated that "even if the case were on all fours we

would not be bound by *Peters*'s conclusion regarding section 1983 liability because such questions implicate federal, not state, law." *Streit*, 236 F.3d at 564. In so holding, the Ninth Circuit ignored the controlling principles set by this Court for deciding issues of state law.

II. CERTIORARI IS NEEDED TO ASSURE THAT FEDERAL COURTS FOLLOW THIS COURT'S REQUIREMENT OF DEFERENCE TO STATE COURTS ON INTERPRETATION OF STATE LAW

The Ninth Circuit's decisions in *Streit* and this case violate state sovereignty and comity. Without this Court's direction, federal courts can become the final arbiters of state law, despite a state court decision directly to the contrary.

Currently in California, state and federal courts directly conflict on the issues of a sheriff's immunity from federal civil rights claims. California courts are bound by *Peters*, while federal district courts in California are bound by *Streit*. The conflict would not exist but for the refusal of the Ninth Circuit's refusal to follow the requirement set forth in *McMillian*; that is, that the federal courts follow "relevant state law" in defining an official's function for purposes of Eleventh Amendment immunity. This Court long ago set forth the primary reason why federal courts must defer to a state court's interpretation of state law. Specifically, in deciding issues of state law, federal courts must defer to state court's interpretation to avoid "constantly disturb[ing] equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do

violence to the principle of uniformity within a state upon which [*Erie Railroad v. Tompkins*, 304 U.S. 64, 74-77 (1938)] is based." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941), citation omitted.

The Ninth Circuit decisions will lead to forum shopping and increased litigation in federal courts. Because the federal courts will entertain suits that California courts would summarily dismiss, civil rights plaintiffs will opt for the federal forum. As *amicus curiae* California State Association of Counties states in its brief in support of the Petition for Writ of Certiorari of the County of Los Angeles in *Streit*, the Ninth Circuit's decision will increase the caseloads of both the federal district courts in California and the Ninth Circuit as well. Because government immunity issues are subject to interlocutory appeals under 28 U.S.C. § 1292, "the Ninth Circuit will become the *de facto* court of original jurisdiction for all civil rights cases involving sheriffs in California." Brief of Amicus Curiae California State Association of Counties at 15.

CONCLUSION

Certiorari should be granted.

Dated: August 20, 2001

Respectfully submitted,
LOUISE H. RENNE
City Attorney
JOANNE HOEPER
Chief Trial Attorney

BRIAN GEARINGER
Deputy City Attorney
Attorneys for Petitioner
City and County of San Francisco

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL FITZWATER, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee.	No. 99-16114 D.C. No. CV-95-02098-WHO MEMORANDUM* (FILED MAY 24, 2001)

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Submitted December 13, 2000**
Submission Deferred December 22, 2000
Resubmitted May 22, 2001
San Francisco, California

Before: THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

Michael Fitzwater appeals the district court's order dismissing his action against the City and County of San Francisco alleging that he was subjected to excessive use of force by sheriff's deputies while detained at the San

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously found this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Francisco County Jail. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

The district court dismissed Fitzwater's 42 U.S.C. § 1983 claim on the ground that "[s]heriffs in California are state actors" and therefore immune from liability under the Eleventh Amendment. *See McMillian v. Monroe County*, 520 U.S. 781, 793 (1997) ("Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties."); *Han v. United States Dep't of Justice*, 45 F.3d 333, 338 (9th Cir. 1995) (per curiam) (Eleventh Amendment bars § 1983 damages claims against state actors sued in their official capacity). We recently decided, however, that when a sheriff in California performs the function of "oversight and management of the local jail," the sheriff acts for the county, not the state. *See Streit v. County of Los Angeles*, 236 F.3d 552, 561 (9th Cir. 2001). As a result, the City and County of San Francisco are not entitled to Eleventh Amendment immunity on Fitzwater's § 1983 claim.

REVERSED and REMANDED.

DO NOT PUBLISH OR INCLUDE IN DATABASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL FITZWATER, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C-95-2098 WHO ORDER (FILED MAY 19, 1999)

For the reasons stated at the May 13, 1999 hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff Michael Fitzwater's ("Fitzwater") "Applicatoin to File Opposition Late" is DENIED. *See* Civil L.R. 7-8(a).

2. Fitzwater's filing entitled, "Plaintiff's Supplementary Authorities," is STRICKEN. *See* Civil L.R. 7-3(e).

3. Defendant City and County of San Francisco's ("County") motion to dismiss Fitzwater's fifth cause of action for "civil rights violations" is GRANTED. The County is immune for suit for actions taken by sheriffs who work as jailers at the County jails. Sheriffs in California are state actors who do not qualify as "persons" within the meaning of 42 U.S.C. § 1983. *See McMillian v. Monroe County*, 520 U.S. 781, 791-92 (1997) (holding that Alabama sheriff is a state actor for purposes of Section

1983 and therefore immune from suit); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1253-54 (C.D. Cal. 1999) (applying Supreme Court's decision in *McMillian* to hold that Los Angeles County sheriff was immune from § 1983 liability because he functioned as a state policymaker when using stun gun to secure courtroom); *County of Los Angeles v. Superior Court*, 68 Cal. App. 4th 1166, 1176-77 (1998) (holding that California sheriffs who detained inmate based on inaccurate warrant are not state actors subject to § 1983 suits).[1]

4. Fitzwater's remaining federal cause of action (third) for civil rights violations is dismissed pursuant to Rules 4(m) and 8(a) of the Federal Rules of Civil Procedure. Fitzwater's complaint lacks sufficient specificity as required by Rule 8(a). Furthermore, he has failed to comply with Rule 4(m), having failed to serve the complaint on a named defendant almost five years after the complaint was filed.

5. Having dismissed all federal claims, the Court declines the exercise of supplemental jurisdiction over Fitzwater's remaining state law claims for negligence, intentional infliction of emotional distress, and assault and battery, and remands this action to the Superior

---

[1] *See also*, Cal. Const. art. XI, § 1(a) (providing that the state shall be divided into counties "which are legal subdivisions of the State"); Cal. Const. art. V, § 13 (Attorney General has "direct supervision over every district attorney *and sheriff . . . in all matters pertaining to the duties of their respective offices*") (emphasis added); Cal. Gov't Code § 26605 ("[T]he sheriff shall take charge of and keep . . . the county jail and the prisoners in it. . . . ").

Court for the City and County [sic] San Francisco pursuant to 28 U.S.C. § 1367 (c) (3).

Dated: May 18, 1999.

/s/ William H. Orrick
William H. Orrick
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL FITZWATER, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee	No. 99-16114 D.C. CV-95-02098-WHO ORDER (FILED MAY 24, 2001)

Before: THOMPSON, O'SCANNLAIN and TASHIMA, Circuit Judges.

This case is resubmitted for decision effective May 22, 2001.

42 U.S.C. § 1983

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injury in an action at law, suit in equity, or other proper proceeding for redress.

California Constitution, Article V, § 13

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in

such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

California Civil Code § 22.2

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

California Government Code § 200

The State has the rights prescribed in this article over persons within its limits, to be exercised in the cases and in the manner provided by law.

California Government Code § 201

The State may punish for crime.

California Government Code § 202

The state may imprison or confine for the protection of the public peace or health or of individual life or safety.

California Government Code § 203

The State may establish custody and restraint of:

(a) Mentally ill persons, insane persons, chronic inebriates, and other persons of unsound mind.

(b) Paupers for the purposes of their maintenance.

(c) Minors for the purposes of their education, reformation, and maintenance.

California Government Code § 12524

The Attorney General may, from time to time, and as often as occasion may require, call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this state, or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this state as contemplated by Section 13 of Article V of the Constitution of this state.

California Government Code § 12550

The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge. When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process.

California Government Code § 12560

The Attorney General has direct supervision over the sheriffs of the several counties of the State, and may require of them written reports concerning the investigation, detection and punishment of crime in their respective jurisdictions. Whenever he deems it necessary in the public interest he shall direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and he may direct the service of subpenas, warrants of arrest, or other processes of court in connection therewith.

California Government Code § 23013

The board of supervisors of any county may, by resolution, establish a department of corrections, to be headed by an officer appointed by the board, which shall have jurisdiction over all county functions, personnel, and facilities, or so many as the board names in its resolution, relating to institutional punishment, care, treatment, and rehabilitation of prisoners, including, but not limited to, the county jail and industrial farms and road camps, their functions and personnel. The boards of supervisors of two or more counties may, by agreement and the enactment of ordinances in conformity thereto, establish a joint department of corrections to serve all the counties included in the agreement, to be headed by an officer appointed by the boards jointly.

California Government Code § 25303

The board may make and enforce rules and regulations necessary for the government of the board, the preservation of order, and the transaction of business.

California Government Code § 26605

Notwithstanding any other provision of law, except in counties in which the sheriff, as of July 1, 1993, is not in charge of and the sole and

exclusive authority to keep the county jail and the prisoners in it, the sheriff shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it, except for work furlough facilities where by county ordinance the work furlough administrator is someone other than the sheriff.

California Penal Code § 4000

The common jails in the several counties of this State are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;

2. For the detention of persons charged with crime and committed for trial;

3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;

4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

California Penal Code § 4015(a)

(a) The sheriff shall receive all persons committed to jail by competent authority. The

board of supervisors shall provide the sheriff with necessary food, clothing, and bedding, for those prisoners, which shall be of a quality and quantity at least equal to the minimum standards and requirements prescribed by the Board of Corrections for the feeding, clothing, and care of prisoners in all county, city and other local jails and detention facilities. Except as provided in Section 4016, the expenses thereof shall be paid out of the county treasury.

(2)

Supreme Court, U.S.
FILED
NOV 13 2001

No. 01-568

In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

MICHAEL FITZWATER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

HARRIET ROSS
Counsel of Record
One Sansome Street
Suite 2000
San Francisco, CA 94104
(415) 775-3523

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BFP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

I. PETITIONER'S REASONS FOR GRANT OF THE WRIT ARE IN ERROR 2

II. THE RECENT DECISIONS OF THE NINTH CIRCUIT ARE NOT IN CONFLICT WITH CALIFORNIA CASE LAW REGARDING THE JAIL KEEPER FUNCTION OF COUNTY SHERIFFS 4

III. CERTIORARI IS NOT NEEDED IN THIS CASE 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Bush v. Gore, 531 U.S. 98 (2000) 4

California Attorney General's Opinions, vol. 63, Opinion No. 80-119 7

Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456 (1967) 4

County of Los Angeles v. Superior Court (Peters), 68 C.A. 4th 1166 (1998), *rev. den'd* (March 17, 1999) 3

Erie Railroad v. Stentor Electric Mfg. Co., 304 U.S. 64 (1938) 4

Harter v. Vernon, 101 F.2d 334 (4th Cir. 1996), *cert. den.*, 117 S.Ct. 2511 (1997) 5, 6

Hess v. Port Authority, 115 S.Ct. 394 (1994) 6

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) 4

McMillian v. Monroe County, 520 U.S. 781 (1997) 2

Pitts v. County of Kern, 17 Cal. 4th 340 (1998) 5

Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F.2d 456 (4th Cir. 1987) 5

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001) 2, 3, 7

STATUTES

42 U.S.C. § 1983 ..... 1, 7

California Election Code § 314 6

California Election Code § 11200 7

TABLE OF AUTHORITIES – Continued

Page

California Government Code § 24000(c) 6
California Government Code § 815.2 7
California Government Code § 26605..... 7
California Penal Code § 4015 7
San Francisco County Charter Article VI § 6.107 6
San Francisco County Charter Article IX § 9.100 7
San Francisco County Charter Article XI § 4(c)..... 6
San Francisco County Charter Article XV 6

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael Fitzwater, respectfully submits that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

Michael Fitzwater was arrested by the police of the City and County of San Francisco, California, on April 14, 1994. In the course of being placed in the custody of the Sheriff of San Francisco in the County Jail, which is under the exclusive control and operation of the San Francisco County Sheriff, he was brutalized by deputy sheriffs to the degree that he suffered spinal fractures, a ruptured spinal disc and severe dental damage.

On March 23, 1995, Fitzwater filed an action in the Superior Court of the State of California, County of San Francisco against the City and County of San Francisco, Sheriff of San Francisco, et al. for civil rights violations under 42 U.S.C. § 1983. The City and County of San Francisco on June 23, 1995 moved the case to the Federal District Court. It was filed by that Court on August 18, 1995. On March 1, 1999 Harriet Ross was substituted as attorney for the Plaintiff.

On April 8, 1999 the City Attorney moved the District Court for removal of the action back to the State Court and dismissal of claims pursuant to 42 U.S.C. § 1983. That Motion was granted. Plaintiff appealed the Order of

Removal and Dismissal and that appeal was granted by the Ninth Circuit on May 24, 2001. The Court followed its decision in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001), a related case. The Court found that the Sheriff of San Francisco in his duties as a jail keeper is not a state agency and not entitled to Eleventh Amendment Immunity.

I. PETITIONER'S REASONS FOR GRANT OF THE WRIT ARE IN ERROR

1. The Petitioner advocates that the Federal Court follow the decisions of the State Courts in determining the status of a County Sheriff as a State Agency in the execution of its duties as a jail keeper and administration of the jail. California Courts have not ruled on the status of a County Sheriff in his capacity as a jail keeper with regard to being an arm of the State in executing those duties, and thus eligible for Eleventh Amendment Immunity.

Petitioner relies on the case of *McMillian v. Monroe County*, 20 U.S. 781 (1947) to support his petition. That case dealt with a sheriff in Alabama that had law enforcement duties, such as investigation of crimes, etc. In *McMillian*, the sheriff was investigating a homicide case which was a duty involving enforcing the laws of the state of Alabama. The Court found that the Sheriff was designated by the Constitution of Alabama an Executive Officer of the State. As such, the sheriff was not a policy maker when enforcing the law, and acted on behalf of the State rather than the county. The Court stated at page 1737, "Thus we are not seeking to make a characterization

of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity." On page 1742, the court stated "Thus since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State and not in another."

Petitioner cites *County of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166 (1998), *rev. den'd* (March 17, 1999), to support his position that a County Sheriff is an arm of the State. That case involved the execution of a warrant, a **law enforcement function** of the Sheriff.

Petitioner claims that in the decision of the Ninth Circuit in the case at bar, the Court relied exclusively on its decision in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001). The *Streit* case reviewed all the pertinent cases in the Federal and State Courts dealing with the status of a County Sheriff as administrator of a jail. The Appellate brief in the case at bar contained additional authorities to support the appellant's position that the County Sheriff, in his capacity as a jail keeper, is not an arm of the state, because in executing those duties, he is not enforcing the laws of the state. He has exclusive control of the administration of the jail and as such he is a County agent. *Streit*, supra.

There are no California cases reported that determine that the County Sheriff is a State agent in the execution of his duties as a jail keeper and administrator of the jail.

II. THE RECENT DECISIONS OF THE NINTH CIRCUIT ARE NOT IN CONFLICT WITH CALIFORNIA CASE LAW REGARDING THE JAIL KEEPER FUNCTION OF COUNTY SHERIFFS

1. Petitioner cites *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967) as a basis for the Federal Court to follow State Appellate Court decisions regarding State Law. The Court, at page 453, states "Thus under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling." The *Bosch* case dealt with a state court ruling regarding the application of federal estate tax wherein the IRS was not made a party to the action.

In *Bush v. Gore*, 531 U.S. 98 (2000) the Court reversed the ruling of the Supreme Court of Florida regarding a recount of votes because it violated equal protection and due process. *Bush v. Gore* is a case where the Federal Court did not follow state court because it involved Federal Constitutional principles.

Other cases cited by Petitioner in support of the Federal Court following state court decisions are diversity of citizenship cases not involving Federal statutes, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) a tort suit and *Klaxon Co. v. Stenter Electric Mfg. Co.*, 3223 U.S. 487 (1941) a contract case. Neither of these cited cases apply to the issues of the case at bar. Neither case involved a Federal statute.

The California case cited, *Pitts v. County of Kern*, 17 Cal. 4th 340 (1998) dealt with the function of the District Attorney in prosecuting a case. The Court held that the function of the District Attorney in prosecuting a person accused of crime is a **law enforcement function** and therefore the district attorney represented the state and had Eleventh Amendment Immunity from suit in that capacity. The Supreme Court of California held that the District Attorney is supervised by the Attorney General in the oversight of criminal prosecutions, training and policy. The district attorney was not the prime policy maker in this regard and therefore is entitled to Eleventh Amendment Immunity.

III. CERTIORARI IS NOT NEEDED IN THIS CASE

In his appellate brief, the Respondent cited *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *cert. den.*, 117 S.Ct. 2511 (1997). In that case two deputy sheriffs sued the Sheriff of Rockingham County, North Carolina for wrongful discharge. The functions of the sheriff in that case were remarkably similar to those of the San Francisco County Sheriff. Indicia of County control, county residents hire the sheriff through election, the county government sets their pay, the county provides for the number of deputies and the county attorney is the official with the power to move to dismiss the sheriff. No state agency or official oversees the activities of sheriffs. The Court followed the principles enunciated in *Ram Ditta v. Maryland National Capital Park and Planning Commission*, 822 F.2d 456 (4th Cir. 1987). The *Ram Ditta* Court stated at page 457, "(2) While many factors must be considered in

determining whether an entity is the *alter ego* of the state, it is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a most important consideration for 'when the action is in essence one for the recovery of money damages from the state, the state is the real substantial party in interest.' . . . Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law." On page 458 n.5, "Although a federal court may consider how the entity is treated under state law, the question of whether an agency is the *alter ego of the state* and thereby immune from federal jurisdiction under the eleventh amendment *is a* question of federal, not state law."

The *Harter* decision also relies on *Hess v. Port Authority Trans-Hudson*, 115 S.Ct. 394 (1994), which held at page 404, "Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determination."

Section 24000(c), California Government Code, designates a County Sheriff as a "County Officer". California Elections Code § 314 "County Office: any elected officer enumerated in Div. 2 (Commencing at 24000) of Title 3 of the Government Code." Article XI, § 4(c) of the Charter of San Francisco provides for the election of the Sheriff, for replacement of the Sheriff by the Mayor and Board of Supervisors under various circumstances. Article VI, § 6.107 and Article XV. He may be recalled by election of

the political unit, Calif. Elections Code § 11200, et seq. The Charter outlines the budget process for Department Heads (Sheriff qualifies as a department head) Article IX, § 9.100 et seq. California Govt. Code § 815.2 requires that monetary damages for 42 U.S.C. § 1983 claims be paid by the county and not the state. The San Francisco County Sheriff is given "sole and exclusive authority to keep the county jail and prisoners." (Cal. Govt. Code § 26605). Expenses of maintaining the County Jail by Sheriffs are to be paid from the County Treasury. (California Penal Code § 4015).

On September 1, 1980, in Opinion No. 80-119, the Attorney General of the State of California gave his opinion whether a County Sheriff could be sued for false imprisonment. The situation was similar to the *Streit* case. The Attorney General advised that a sheriff may be subject to liability for false imprisonment, if he does not exercise reasonable diligence to effect the release of a defendant whose discharge from custody has been ordered by the Court.

CONCLUSION

1. 42 U.S.C. § 1983 is a Federal Statute and the Federal Court will determine the violation of those rights by a County Sheriff. In doing so, the Federal Courts may consider State Court decisions regarding the nature of the activity of the County Sheriff, whether it is a county or state agent for purposes of eligibility for Eleventh Amendment Immunity.

2. One of the most determinative indicia of whether a County Sheriff is acting as a County or State agent is which entity would pay damages for the acts of the sheriff. If it would be the State then, the Sheriff would be the *alter ego* of the state and would enjoy Eleventh Amendment Immunity. If the County would have to pay, then there would be no Eleventh Amendment Immunity. In addition the Court considers the autonomy of the Sheriff in executing his duties. If he is not supervised by a State agent in those duties then he is a County agent and ineligible for Eleventh Amendment Immunity. Other factors are the extent to which the sheriff is involved locally or statewide. Local involvement designates County agent as opposed to State agent.

3. California Statutes, Constitution and San Francisco County Charter develop the nature of the San Francisco County Sheriff as an autonomous administrator of the County Jail. He is paid by the County, his expenses are paid by the County and if he is sued for damages, the damages are paid by the County. All these elements governing the position of the County Sheriff of San Francisco make him a County actor and not a State agent. Therefore he is not eligible for Eleventh Amendment Immunity.

4. The Ninth Circuit decision in the within case was proper and certiorari should not be granted Petitioner.

Dated: November 13, 2001

Respectfully submitted,

HARRIET ROSS,
Attorney for Respondent

One Sansome Street
Suite 2000
San Francisco, CA 94104
(415) 775-3523